United States Court of Appeals

for the Second Circuit

APPENDIX

76-1089

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

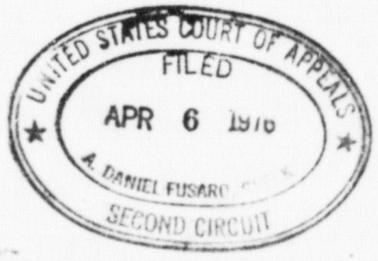
ALAN GREGORY MARTIN,

Appellant.

Docket No. 76-1089

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
ALAN GREGORY MARTIN
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel.

A

DATE	PROCEEDINGS
	Allan Gregory David Martin : For U.S., Thomas H. Sear, AUSA.
	For deft. John Guttman, Esq. Legal Aid Society
	Magistrate # 75-387
	Deft. has been convicted as charged : Assault by striking, beating, or wounding on territory within the jurisdiction of the United States. (Violation of 18 U.S.C. Section 113(d))
6-17-75	Filed Judgement- Ninety(90) days with credit for five(5) days served before making bail while awaiting trial.
	Enforcement of sentence is stayed pending appeal on condition that a $10,000.00 personal recognizance bond be signed by the defendant and co-signed by his parents. Mag.Goettel.
6-17-75	Deft's application to proceed on appeal in forma pauperis is granted. Mag. Goettel.
6-18-75	Filed notice of appeal to the United States District Court Part I from the final judgment of June 17,1975.(Notices to Deft's atty. & Govt's atty.)
9-12-75	Filed CJA-21, Transcribing tapes for Legal Aid for Katherine Snodgrass.
9-18-75	Filed Brief for Appellant.
9-18-75	Filed Appendix to appellant's brief.
10-14-75	Filed the following papers: Magistrate's Docket entry sheet and copy, SDNY;Memorandum of Law in Support of a Motion for Judgment of Acquittal;Govt.'s Memorandum in Opposition to Deft.'s Motions to Dismiss the Complaint and for a Judgment of Acquittal; Criminal Complaint,SDNY;Disposition sheet;Decision by Mag.Goettel;Mag.'s Surety Bond in the amount of $10,000;Estimated Parole release Guidelines;Blank Form of Report on Sentenced Offeder by U.S.Dist. Judge;Appearance Bond in the amount of $1000.;Consent to be Tried By U.S.Mag.;Financial Affdvt.;Temprary Commitment;Order Appointing Counsel;and consent by deft.'s Father to allow Ada Martin to sign his name to a bond for son,Allen Martin, also envelope containing 2 transcripts (These documents have been sent to Judge Knapp's Chambers.)
10-20-75	Filed Brief for the USA.(This document has been sent to Judge Kanpp's chambers.)
12-29-75	Filed Memorandum and Order #43,619--Magistrate's Opinion affirmed. ---Knapp,J.
2-17-76	Filed Notice of Motion for an order directing that the notice of appeal for the deft. be deemed to have been filed as of 12-19-75.

D. C. 110 Rev. Civil Docket Continuat'

DATE	PROCEEDINGS
	Allan Gregory David Martin — For U.S. Thomas H. Sear, AUSA
	For deft. John Gutman, Esq. Legal Aid Society
	Magistrate # 75-387
2-17-76	Filed Endorsed Memorandum on Notice of Motion filed 2-17-76--Deft. & atty. (John P. Curley & Michael Young) present. Deft.'s application for an extention of time to file his Notice of Appeal is granted on the condition that the Notice of Appeal be filed within five(5) days. Bail pending appeal is continued. Knapp,J.
2-18-76	Filed Notice of Appeal to the USCA for the Second Circuit from a final judgment of the USDC for the SDNY entered on 12-19-75 affirming a final judgment of the Magistrate's Court for the SDNY entered on 6-17-76. m/n to Hon.Thomas James Cahill, Acting U.S. Atty., SDNY.

LI,II:cf

Approved: LAWRENCE IASON, II
Assistant United States Attorney

75-387

B

Before: HONORABLE GERARD L. GOETTEL
United States Magistrate
Southern District of New York

- X

UNITED STATES OF AMERICA :

:

-v- : COMPLAINT

:

: Violation of
ALAN GREGORY DAVID MARTIN, : 18 U.S.C. §113(d)

Defendant. :

- X

SOUTHERN DISTRICT OF NEW YORK, ss.:

CHARLES FRANCIS NERGELOVIC, being duly sworn, deposes and says that he is a Hospital Officer, Castle Point Veterans Administration Hospital, and charges as follows:

On or about the 8th day of February, 1975 ALAN GREGORY DAVID MARTIN, the defendant, unlawfully, wilfully and knowingly did assault by striking, beating and wounding the complainant, Charles Francis Nergelovic, while the complainant was acting in the course of his official duties at the Castle Point Veterans Administration Hospital, Castle Point, New York, a facility that is a part of the territorial jurisdiction of the United States and within the Southern District of New York.

The bases for deponent's knowledge and for the foregoing charges are, in part, as follows:

1. While I was on duty at the Castle Point Veterans Administration Hospital at approximately 4:45 p.m. on March 8, 1975, I was told that there was a white male on Ward D2 who had been harrassing a nursing assistant and was brandishing an open knife. Hospital Officer Elbert Newkirk and I were told to provide assistance. After arriving at Ward D2, I saw the individual, later identified as ALAN GREGORY DAVID MARTIN, the defendant, and asked him whether he had a visitor's pass and whether he had a weapon. MARTIN was told to place his hands against the wall with his feet back. Officer Newkirk proceeded to determine whether MARTIN had a weapon. At this time MARTIN turned and struck me on the neck and right arm. A struggle ensued for approximately five minutes before MARTIN was subdued.

WHEREFORE, deponent prays that a warrant may

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issue for the apprehension of the above named defendant and that he may be arrested and imprisoned, or bailed, as the case may be.

Chas. F. Nergelovic

CHARLES FRANCIS NERGELOVIC

Sworn to before me this
10th day of March, 1975

James L Smith

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA :

- v - :

ALAN GREGORY DAVID MARTIN, :

Defendant. :

- x

DECISION

75 - 387

Defendant is charged with a violation of 18 U.S.C. § 113(d) - assault by striking, beating, or wounding on territory within the jurisdiction of the United States, a petty offense. He has waived trial in District Court and agreed to be tried by a Magistrate.

The facts are largely uncontested. On March 8, 1975, the defendant went to the Castle Point Veterans Administration Hospital to see a nurse on the hospital staff. He had been living with the nurse, and they had had a disagreement the previous evening. Following several discussions with the nurse, a report was made to the hospital security officers that a man with a knife was causing a disturbance on the ward.

After speaking with the nurse, the two hospital officers came upon the defendant from different directions. The first officer, identifying himself as such, asked him if he had a visitor's pass, what his name was, and what he was doing in the hospital. He made no reply. He was asked if he had a weapon* and he replied that that was for them to find out. He did open his coat to show that he had no weapon in plain sight. Defendant stated that he would not leave until he had seen the nurse again and that no one was going to put him out

* No weapon was discovered on the person of the defendant. A knife was found in the vicinity shortly after the incident, but there was no evidence to connect the weapon to the defendant.

of the hospital. There was no proof (or claim) that he had lawful business in the hospital ward.

The first officer then directed defendant to put himself against the wall; he initially refused. After the arrival of the second officer, defendant followed their directions and placed his hands against the wall. While he was being frisked by officer Newkirk, he suddenly pushed himself off the wall and swung at Newkirk, missing him. At that point, the other officer, Nergelovic, who had been standing approximately seven feet behind him, came forward and was struck by the defendant's other arm on the neck and upper arm. (Nergelovic testified that he received no substantial injury from the blow and did not require medical treatment.) A scuffle ensued and the three fell to the ground, Newkirk putting a full nelson on the defendant, and Nergelovic assisting in handcuffing him.

At the conclusion of trial, the defendant moved to dismiss the complaint on grounds that it did not establish the offense charged. It should be noted that the defendant was not charged with resisting a federal officer in the performance of his duties (a felony under 18 U.S.C. § 111), apparently because the V. A. hospital officers (despite the policeman type uniform they wear) are not included in the provisions of § 1114 of Title 18 as protected officers and employees of the United States. Nor was the defendant charged under the assimilated crimes section, 18 U.S.C. § 13. He was charged under a specific federal statute dealing with assaults within the federal

territorial jurisdiction. There is a preliminary issue concerning a clerical error in the complaint which gives the date of the assault as February 8, 1975, rather than March 8, 1975. This has not been pursued by the defendant in his post trial papers. In any event, the variance was not prejudicial in that the defendant was immediately arrested and held in custody until arraignment, when the complaint was filed, and, beyond any doubt, knew that the correct date was March and not February. It can, therefore, be disregarded. Federal Rules of Criminal Procedure, 52(a).

On the merits, defendant argues:

1. That criminal intent is an essential element of the crime and that it has not been proved.
2. That injury is an essential element of assault by striking, and that only a trivial battery without injury has been proved.
3. That New York state law governs and that the events which occurred here constitute, at most, the violation of "harassment" and not the crime of assault.

Where a statutory offense is merely the codification of a common law crime, it may not be deprived of its common law element of intent. Morissette v. United States, 342 U.S. 246, 262 (1961). But intent is a matter to be determined by the trier of fact, and it may be proved by:

> "Acts and conduct and the circumstances and reasonable inferences to be drawn from them." United States v. Barash, 365 F.2d 395, 402 (2d Cir., 1966).

Further, assault is a "general intent" crime. See Pino v. United States, 370 F.2d 247,248, f.n. 1, (D.C. Cir., 1966); Parker v. United States, 359 F.2d 1009, 1013 (D.C. Cir., 1966). It is noteworthy that the word "intent"was omitted from 18 U.S.C. § 113(d), although it was included in the three preceding subsections. This in indicative of a legislative intent to leave assault by striking, as set forth in subsection (d), a general intent offense, as is simple assault under subsection (e) of § 113, Cf. Parker, supra, 359 F.2d at 1013. Moreover:

> "Where a crime requires a general intent ... the principle that a person intends the reasonable consequences of his actions has validity." United v. Cangiano, 491 F.2d 906, 910 (2d Cir., 1974).

Thus it need only be found that defendant knew, or could reasonably foresee, that his actions might have the forbidden consequence for there to be a violation of § 113(d) or under the lesser included offense of simple assault, subsection (e).

Considering the defendant's actions, it is clear that he had the requisite general intent for a violation of § 113(d). He swung at and missed Officer Newkirk. (That, in itself, would be a violation of § 113(e), the lesser included offense.) Then, after striking Officer Nergelovic, he began to "scuffle" with both officers. Even if a specific intent were required, it is a reasonable inference from this behavior that defendant intended an assault. As a matter of general intent, it was reasonably foreseeable that, by swinging around

with upraised arms, defendant would strike one of the officers. The fact that the motive for the assault was to resist a search of his person would not make it any less an assault*

The definition of "assault" under § 113(d) is governed by Federal law, not state law. § 113(d) does not incorporate state law by reference as does 18 U.S.C. § 13.

> "Title 18 U.S.C. § 13 applies to acts not made punishable by an enactment of Congress which would be punishable if committed within the jurisdiction of the state in which the place reserved for the use of the United States is located. That is not our case. We are dealing here with a specific enactment of Congress." United States v. Anderson, 425 F.2d 330, 332 (7th Cir., 1970).

As in the present case, the court in Anderson was applying § 113(d). In accord, see Hockenberry v. United States, 422 F.2d 171, 173 (9th Cir., 1970), and United States v. Patmore, 475 F.2d 752, 753 (10th Cir., 1973), applying § 113(c), and United States v. Fernandez, 497 F.2d 730, 742 (9th Cir., 1974), applying the assault on a federal officer statute, 18 U.S.C. § 111.

Since Federal law governs the definition of "assault" under § 113(d), defendant's reliance on Daly v. Pederson, 278 F.Supp. 88 (D.Minn., 1967), is misplaced. That case did not arise under § 113, and the state rule applied there has no significance here. Consequently, any

* No issue was raised by defendant concerning the authority or propriety of the officers searching defendant under the circumstances existing.

New York State law distinction between "harassment" and "assault" of no significance here.

Since a violation of § 113(d) requires only a general intent, a violation may be found:

> "without regard to whether it was specifically intended that (defendant's act) in the particular instance would issue in serious injury." Parker v. United States supra, 359 F.2d at 1013.

Under the Federal criminal law, an assault can be an "incidental touching or no touching at all." United States v. Bamberger, 452 F.2d 696, 699 (2d Cir., 1971), cert. denied, 405 U.S. 1043 (1972).

In United States v. Alsondo, 486 F.2d 1339, 1345, (2d Cir. 1973), reversed on other grounds sub nom. United States v. Feola ____ U.S. _____, 43 U.S.L.W. 4404 (March 19, 1975), the defendant merely "lifted his hand menacingly, as though to shove Lightcap, and did in fact shove him - both acts sufficient to constitute a crime under section 111. Bamberger and Alsondo are the definite decisions in the Second Circuit construing assault under the federal law. Although they were decided under 18 U.S.C. § 111, the opinions in those cases establish the definition of assault for the purposes of this case. Since an "incidential touching" is sufficient for an assault under 18 U.S.C. § 111, a felony, it certainly is not necessary that there be any lasting injury or wound for a conviction under 18 U.S.C. § 113(d), a petty offense.

The Federal definition of "assault" is the tra-

ditional common law view:

> "An unlawful offer or attempt with force or violence to do a corporeal hurt to another." Blacks Law Dictionary - third edition.
>
> "Thus a person who, in fact, has the present ability to inflict bodily harm upon another, and wilfully threatens or attempts to inflict bodily harm ... may be found guilty of forcibly assaulting such person." Burke v. United States, 400 F.2d 866, 868 (5th Cir., 1968), cert. denied 395 U.S. 919 (1969).

Defendant in the present case had the ability to inflict bodily harm on Officers Newkirk and Nergelovic. Therefore, defendant is guilty of assault under Section 113. The only distinction between simple assault under subsection (e) and conviction under (d) is that there must be a "striking, beating or wounding." The words are set forth disjunctively and a simple striking satisfies the requirement of the statute. The absence of serious harm is a matter to be considered (if at all) in connection with sentencing.

I, therefore, find the defendant guilty as charged. He is directed to appear forthwith before the Probation Department for purposes of the preparation of a pre-sentence report. Sentencing will be on June 4 at 10:30 a.m.

Respectfully,

Gerard L. Goettel

Gerard L. Goettel
United States Magistrate

DATED: New York, N. Y.
April 21, 1975

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA :

-v- :

ALAN MARTIN :

Defendant :

----------X

D

MEMORANDUM OF LAW IN
SUPPORT OF A MOTION FOR
JUDGMENT OF ACQUITTAL

WILLIAM J. GALLAGHER
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
15 PARK ROW 10th FLOOR
NEW YORK, NEW YORK 10038

JOHN GUTMAN
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA :

-v- :

ALAN MARTIN :

Defendant :

----------X

FACTS OF THE CASE

Defendant, Alan Martin, on March 8, 1975, went on the premises of Castle Point Veterans Administration Hospital for the purpose of seeing his fiancee, Ms. Pearl Merriweather, a nurse on Ward D-2.

He went up to the ward and had a discussion with her in the corridor, next to the elevator door.

He remained by the elevator, leaning against the wall when a federal policeman, Charles Nergelovic, came upon the defendant and spoke to him.

Mr. Nergelovic asked Mr. Martin some questions to which there was no response and then Mr. Martin was ordered to put his hands against the wall. Mr. Martin refused. At this point Mr. Newkirk, another federal policeman, approached and reordered Mr. Martin to get against the wall. Mr. Martin complied with the second request and Mr. Newkirk proceeded with the frisking of Mr. Martin. Mr. Nergelovic was behind

Mr. Martin.

At this point Mr. Martin pushed himself off the wall and there was body contact between Mr. Martin and Mr. Nergelovic. A scuffle ensued, all 3 persons went to the floor and defendant was told that he was under arrest for assault on a federal officer.

Mr. Nergelovic testified that he was 6 to 8 feet away from Mr. Martin and when Mr. Martin pushed himself off the wall, Mr. Nergelovic lunged into Mr. Martin and defendant's upper arm made contact with Mr. Nergelovic's neck and upper arm.

Mr. Nergelovic testified that due to this contact, he had not seen a doctor, had not lost any time from work, suffered no pain, had no bruises, and in fact, as Mr. Nergelovic stated "there was no injury".

The second government witness, Mr. Darcy, testified that he saw defendant leaning against the wall near the elevator and in response to Mr. Newkirk's request, defendant put his hands up against the wall. At this point, Mr. Nergelovic was behind and a foot away from the defendant. Defendant pushed himself off the wall and there was body contact. Then each officer grabbed one arm of the defendant and all 3 persons fell to the floor, at which point Mr. Martin was handcuffed and placed under arrest.

Mr. Darcy also testified, that he thought Mr. Newkirk was the officer that had body contact with the defendant, but

said he was told that it was in fact Mr. Nergelovic who had the body contact.

The defendant was charged with a violation of Title 18 U.S.C. §113, which makes it a crime to assault by striking, beating or wounding anyone within the maritime and territorial jurisdiction of the United States.

The defense has stipulated that Castle Point Veterans Administration Hospital is within the above-described jurisdiction.

POINT I

THERE IS A FAILURE TO COMPLY WITH THE STATUTE CHARGED UNDER THE FACTS OF THIS CASE

The section charged makes it a crime to assault by striking, beating or wounding another.

There has been no evidence of striking, wounding or beating.

Officer Nergelovic testified that defendant's upper arm came in contact with his neck and upper arm.

The above-mentioned contact certainly cannot be classified as wounding or beating nor should it be considered striking, since there was no intent to strike.

POINT 2

CRIMINAL INTENT AND THE INTENT TO INJURE ARE ESSENTIAL ELEMENTS OF THE CRIME OF ASSAULT

"Criminal intent is a sine qua non of criminal responsibility" Rent v. U.S. 209 F.2d 893, 900 (5th Cir. 1954).

Assault is defined as "an intentional, unlawful offer of corporal injury to another by force." Black's Law Dictionary, Revised Fourth Edition, 1968, p.147.

The "intention to harm is of the essence" Ibid. p.147.

Simple assault and battery is an unlawful act of violent injury to another..... Ibid. P.148

In Guarro v. U.S., the court held that assault at common law is "an attempt with force or violence to do corporal injury to another...." 237 F.2d 578,580.(C.A.,D.C.Cir.,1956)

From the evidence elicited at trial there is no showing that Mr. Martin had either criminal intent nor intent to injure. The defense submits the contact was unintentional.

POINT 3

INJURY IS A NECESSARY ELEMENT OF CRIME OF ASSAULT BY STRIKING,BEATING, OR WOUNDING ANOTHER.

Title 18 U.S.C. §113 (d) speaks of assault but,the defense submits, it really means battery.

Black's Law Dictionary states "the actual offer to use force to the injury of another person is assault; the use of it is battery, which always includes an assault," p.193.

In Daly v. Pedersen, plaintiff brought an action under the Civil Rights Act for assault in that, defendants in effectuating the arrest of plaintiff, shoved plaintiff. More specifically, "the plaintiff allege[d] that Collins and Pedersen shoved plaintiff down the hallway... and that defendant Pedersen assaulted plaintiff on the way down the steps to the Bloomington Jail...". Daly v. Pedersen 278 F.S. 88,94. (U.S.D.C.,D.Minn. 1967).

In dismissing the complaint, the Court stated that "... plaintiff has neglected to allege any more than a trivial battery at best." The Court further stated that "moreover, the plaintiff has not alleged any injury whatsoever as a result of the 'shove' " at p.94.

At best, what is evident in the instant case is also a trivial battery without any allegation of injury.

Under New York State Law, injury is essential to the crime of assault. Prior to 1967 when the Old Penal Law was in effect, every technical battery was cognizable under the crime of assault. The revisers intended, under the new Penal Law effective September 1, 1967, to eliminate the criminal connotation from such technical batteries and created the violation of harassment.

Harassment is when a person "strikes, shoves, kicks, or otherwise subjects [another] to physical contact..." New York State Penal Law §240.25 (1).

Had the same circumstances occured within state jurisdiction, the defendant at most, would be prosecutable for the violation of harassment.

CONCLUSION

For all of the afore-mentioned reasons, defendant respectfully moves this Court to grant the motion for a judgment of acquittal under Rule 29 , F.R. Cr.P.

Respectfully submitted,

WILLIAM J. GALLAGHER
FEDERAL DEFENDER SERVICES UNIT
THE LEGAL AID SOCIETY
15 PARK ROW 10th FLOOR
NEW YORK, NEW YORK 10038
TELEPHONE: 212-374-1737

JOHN GUTMAN
Of Counsel

CERTIFICATE OF SERVICE

4/6, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Michael D. Y